89-678

Case No. _____

Supreme Court, U.S.
FILED
SEP 26 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October 1989 Term

DEAN POLING,

Petitioner

vs.

ELLIS MURPHY, BARBARA OLLIS, ALTA EDWARDS, RONALD WILCOX, UNICOI COUNTY BOARD OF EDUCATION, KENNETH LEWIS, DORIS HENSLEY, GARLAND EVELY, GLENN HOWARD, PAUL MONK, CAROLYN SEELEY, & W. A. WILSON

Respondents

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Submitted By:
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42 pp

QUESTION PRESENTED FOR REVIEW

Is a high school student's personal campaign speech which criticizes the Administration but does not interfere with the operation of the school protected by the First Amendment to the United States Constitution?

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PRIOR OPINIONS

The opinion is of the Sixth Circuit Court of Appeals and the District Court are appended as Exhibits 1, 2A and 2B. The order denying rehearing is appended as Exhibit 3.

The decision of the United States Court of Appeals for the Sixth Circuit is designated for publication but not yet published. The decision of the United States District Court For the Eastern District of Tennessee, Northeastern Division, is not published.

STATEMENT OF JURISDICTIONAL GROUNDS

This petition for writ of certiorari, sought pursuant to 28 U.S.C. Section 1254, seeks review of the Sixth Circuit Court of Appeals' affirmance of a district court's grant of summary judgment. The Sixth Circuit affirmed the dismissal by decision filed on April 18, 1989. Petitioner's Request for Rehearing or Rehearing En Banc was denied by court order entered on June 28, 1989, appended as Exhibit 3.

RELEVANT CONSTITUTIONAL PROVISIONS AND RULES

United States Constitution,
Amendment One

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably assemble, and petition the Government for a redress of grievances."

United States Constitution,
Amendment Fourteen, Section 1

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Federal Rules of Civil Procedure,
Rule 56 (c) and (e)

"(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material of fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

. . .

"(e) Forms of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that such facts as would be admissible in evidence, and shall the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or serve therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denial of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

STATEMENT OF THE CASE

Dean Poling was an honor student at Unicoi County High School in Erwin, Tennessee, who was a candidate for president of the student body. Poling and the other candidates wrote their own

individual speeches which they delivered at an assembly. Prior to delivery Poling's speech was reviewed by a faculty advisor who made grammatical corrections and bracketed three lines telling Poling to "change this and your speech will be alright." The portion which young Poling was asked to change included his thoughts about the school's progress compared to a neighboring school: "Because of this administration's iron grip, our school has been kept behind other schools like Science Hill." The advisor said she had directed this portion of the speech changed because it was not true. She did not tell Poling to change any other parts, did not ask to review the changed speech, and did not tell Poling how to change the speech.

Poling delivered his revised speech in which he stated: "For example, why does Mr. Davidson stutter when he is on the intercom? He doesn't have a speech impediment. If you want to break the iron grip of the school, vote for me for President." Following the speech, Poling was reprimanded by Principal Murphy, called to his office, and expelled from the election. The Petitioner was given no notice or opportunity to explain the circumstances which were not detailed clearly by the advisor. The student handbook which advised students of potential disciplinary infractions and punishments contained no provisions which advised Poling of the possibility of expulsion from the race for making political statements during a campaign.

Following the Petitioner's expulsion from the race, the advisor, principal, and superintendent discussed the decision with Poling and his father and encouraged them to seek review with the local school board. Petitioner and his father did as the Respondents suggested and scheduled a hearing before the Unicoi County Board of Education. Upon advise of counsel, Superintendent Wilcox cancelled the scheduled board hearing and declined to reschedule despite Petitioner's request.

Petitioner challenged the prior restraint, disqualification, and discipline imposed upon him in an action alleging a violation of his First and Fourteenth amendment rights under 42 U.S.C. Section 1983 and filed in federal court pursuant to 28 U.S.C. Section 1343. Respondents filed a Motion for Summary Judgment supported by affidavits of the advisor, principal, and superintendent, all of whom

were defendants. The affiants claimed that they feared that the speech would incite disruption because several students clapped, stood up, and yelled "way to go Dean."

The Petitioner moved to strike much of the affidavits which were replete with testimony violative of the Federal Rules of Evidence 602, 701, 704, 802, and 803, and filed his own affidavit and those of two students and two nondefendant faculty members which disputed the conclusions drawn in the Defendants' affidavits. The District Court did not rule on the Motion to Strike but instead granted the Motion for Summary Judgment on the First amendment claim holding that Petitioner's "speech was impertinent and . . . certainly imputed improper motives as to school administrators . . . [and] [a]ccordingly . . . was within the realm of the right to regulate such speech at school assemblies." Poling v. Murphy, CIV-2-87-229, Order (E.D. Tenn. Dec. 18, 1987)(attached as Exhibit 2A). Thereafter, the court denied the motion to strike on mootness grounds.

Following the order Defendants moved for reconsideration but submitted no new information to the court. The court granted the motion and dismissed the remaining due process claim holding that "Mr. Poling probably knew perfectly well [that his speech] would alarm the administration [and] while it may have been that the school administration overreacted to the speech . . . it could not have been a surprise to Mr. Poling that he received some discipline. In addition . . . the Fourteenth Amendment does not mandate prediscipli-nary hearings in school situations." Poling v. Murphy, supra, Order (E.D. Tenn. March 22, 1988).

The Petitioner appealed the grant of summary judgment to the Sixth Circuit Court of Appeals. A divided court upheld the dismissal, yet never addressed the material factual issues presented by the opposing affidavits. Instead the court focused on its mistaken impression that Petitioner had run to the "remote federal court" comprised of "outsiders . . . at a loss even to understand the full significance of Dean Poling's reference. . ." and with no "firsthand knowledge of the atmosphere . . . or the sense of propriety of those who work and study there," Poling v. Murphy, No. 88-5538, at 8 (6th Cir. April 18, 1989)(attached as Exhibit 1), rather than seeking redress from

the local board of education "steeped in the culture of the place" and at least "acquainted with some of the participants in the drama." Id. at 8-9. In closing, the two-member majority held that Poling's individual campaign speech was "school sponsored" and thus allowed the administration to exercise control related to "legitimate pedagogical concerns." Id. at 14 (citing Hazelwood School District v. Kuhlmeier, 484 U.S. _____, 108 S. Ct. 562, 98 L.Ed.2d 592 (1988)("If words have meaning, that is the First Amendment test which we are required to apply to Dean Poling's campaign speech.")).

Recognizing that the majority had applied the "wrong First Amendment test to this student's political speech," dissenting Judge Merritt pointed out that Petitioner's "pure, political speech" in a "school forum" is "protected by the First Amendment under a test substantially similar to that for adults." Id. at 16-17 (Merritt, J., dissenting)(citing West Virginia State Bd. of Education v. Barnette, 319 U.S. 624, 637 (1943)).

> Dean Poling's speech . . . was "political speech," pure and simple. It was not a vulgar speech like the one found unprotected in Bethel or a gross invasion of the right of privacy of an unwed pregnant student as in Hazelwood. Poling was running for president of the student body . . . . He made a tough populist speech, short but not sweet. . . . His fellow students from the hills and hollows of upper East Tennessee stood and cheered, but they were not disruptive . . . . If the school administration

> can silence a student criticizing it for being narrow-minded and authoritarian, how can students engage in political dialogue with their educators about their education?

Id. at 18 (Merritt, J., dissenting).

Petitioner filed a Petition for Rehearing and Rehearing En Banc as a result of the numerous mistakes in fact and misapplication of law by the majority. The Petition was denied on June 28, 1989, (attached as Exhibit 3). This Petition for Certiorari is filed pursuant to 28 U.S.C. Section 1254 in an effort to rectify the Sixth Circuit's opinion which removes free speech rights at the schoolhouse gate by expanding the school sponsorship language in Hazelwood to erode the principles of Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969).

ARGUMENT

I. This petition for writ of certiorari should be granted to correct the Sixth Circuit Court of Appeal's misapplication of important Supreme Court precedent.

In 1969 this Court established that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969). Tinker involved students who silently communicated their disagreement with the Vietnam conflict by wearing black armbands. While there was no evidence of disorder or disruption, the school administrators feared a disturbance might be prompted. Finding that more was necessary to suppress expression than "a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoints," id. at 509, this Court reversed a lower court's order which prohibited the wearing of the armbands. In order to assure that the First Amendment did not become so "circumscribed that it exists in principle but not in fact," id. at 513, this Court

established a test to determine the breadth of protected speech in the school setting. Quoting from Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967) the Court recognized that:

> [t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools .... The classroom is peculiarly the 'marketplace of ideas.' The nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues' [rather] than through any kind of authoritative selection.

Id. at 512 (citations omitted). Thus, it was established that First Amendment protection for students is not limited to expressions during "classroom hours" but includes expressions on campus during any authorized hour and embraces "personal intercommunication among the students" and "opinions on controversial subjects" so long as the expression is made without "'materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school' and without colliding with the rights of others." Id. at 513 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).

Against this backdrop this Court allowed the discipline of a student for expression when the expression was a "vulgar and offensive" nomination speech before a partially immature audience. Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986); see Hazelwood School District v. Kuhlmeier, 484 U.S. _____, 108 S. Ct. 562, 570 n.4 (1988). The discipline imposed, unlike that in Tinker and here, was "unrelated to any political viewpoint," id. (emphasis added); further, school rules prohibited the conduct and warned the student of the repercussions. The Court recognized the obvious distinctions between the political expression in Tinker and the sexual monologue

before it and left Tinker's principles in tact.

Two years later the Court returned to the Tinker test but affirmed the censorship of a school newspaper produced by students as part of a class at school expense, with school support, and by use of the school name. Hazelwood School District v. Kuhlmeier, 484 U.S. _____, 108 S. Ct. 562 (1988). Turning again to the nature of the expression, the Court, through Justice White, distinguished between the issue of the tolerance of "particular student speech" raised in Tinker and the promotion of school-sponsored speech at issue in Hazelwood. Id. at _____, 108 S. Ct. at 569.

> The former question addresses educator's ability to silence a student's personal expression that happens to occur on the school premises. The latter question concerns educators' authority over school-sponsored publications . . . and other expressive activities that . . . might reasonably [be perceived] to bear the imprimatur of the school.

Id. at _____, 108 S. Ct. at 569. Thus, the Court concluded that the Tinker test was not applicable to "determining when a school may refuse to lend its name and resources to the dissemination of student expression." Id. at _____, 108 S. Ct. at 570. Suppression of expression may be allowed under these circumstances when suppression is "reasonably related to legitimate pedagogical concerns." Id.

The Tinker-Bethel-Hazelwood trilogy imparts the principle recognized by Judge Merritt in his dissent in this case: political or "pure" speech enjoys First Amendment protection and cannot be suppressed absent a specific showing that the expression materially and substantially disrupts or interferes with the rights of others. Poling v. Murphy, No. 88-5538, at 17 (6th Cir. April 18, 1989)(Merritt, J., dissenting). Stated succinctly, the political expressions of students

remain protected.

The majority opinion blurs the distinction and functionally erodes all protections for student expression occurring on school property. By stretching Justice White's school-sponsored expression concept, the majority held that Poling's personal campaign speech written and delivered by him in an effort to garner student's votes in a student election for the presidency of the student body was school-sponsored speech. It is recognized that the speech was delivered at school during a school-sponsored activity and during school hours. But the place of the speech cannot determine whether its content is protected. If every on-campus statement made during school hours or at school functions is "school sponsored" then students have no First Amendment freedoms from the time the morning bell clangs signalling school is open until the school bus pulls away from the property at the end of the day. That is, the students shed their First Amendment rights at the schoolhouse gates.

In support of its position the Sixth Circuit majority referred to a Fourth Circuit decision, Crosby v. Holsinger, 852 F.2d 801 (4th Cir. 1988), in which a principal's elimination of a school mascot was affirmed. The decision in Crosby illustrates perfectly the appropriate application of the school-sponsored expression concept. "Johnny Reb" was the school mascot whose picture appeared on uniforms for school teams, signs and billboards with the school's name, and trinkets and keepsakes identified with the school. The mascot was the school's symbol for athletics, promotion, and identification. Similarly the Spectrum was the Hazelwood East High School school newspaper. Dean Poling's speech was Dean Poling's. It was not and did not purport to be the speech of Unicoi County High School. It neither expressed or represented the viewpoints of the school. It represented the political expression and belief of Dean Poling. Since there were numerous other candidates whose speech expressed their individual, political beliefs, it defies reason to suggest that the differing viewpoints expressed by the candidates somehow all bore the imprimatur of the school!

Dean Poling was punished for expressing his political belief in a school-sponsored activity. The Administration rather farcically claimed fear of disruption by the expression as a result of

clapping, yelling students. Other faculty did not find the reaction to be any different than that expected at a student political rally. Despite these material issues of fact, the Petitioner was denied a trial because his comments were "impertinent" and lost his appeal because, among other reasons, "[t]he art of stating one's view without indulging in personalities and without unnecessarily hurting the feelings of others surely has a legitimate place in any high school curriculum." Poling v. Murphy, supra, at 12. Surely the First Amendment's protections for students have not diminished to the degree that they depend upon their congeniality! This Court recognized long ago that the test for First Amendment protection is not rudeness or impoliteness but disruption and disorder. Id. at 17.

This Court must reiterate the lost message of Tinker that students are people and citizens under our Constitution entitled to express their political beliefs even when those expressions dare to criticize adult administrators. Leaving the Sixth Circuit's opinion in this case unchecked erodes the most important principle of freedom in the most important forum for its development. "The vigilant protection of Constitutional freedoms [of expression] are nowhere more important than in the community of American schools." Keyishian v. Board of Education, 385 U.S. 589 (1967). It fosters the promotion of a "homogenous people," Meyer v. Nebraska, 262 U.S. 390, 402 (1923), who may be regarded as "closed-circuit recipients of only that which the state chooses to communicate" and "confined to the expression of [only] those sentiments that are officially approved." Tinker v. Des Moines Indep. Community School District, 393 U.S. 503, 511 (1969).

Dean Poling dared to believe that he had a right to express his opinions and criticisms to his fellow students in an effort to secure their support. He dared to believe that he could point out shortcomings and areas where improvement was necessary. He dared to believe that he could seek to be the president of the students by expressing what was on one student's mind. He dared to believe all those things because of the First Amendment to the Constitution. For his belief and expression, he received expulsion from the race. The valuable civics lesson taught by the school was not freedom, democracy, or justice; it was simply that expression in the school context must be limited to those views shared by the Administration.

II. This Court should grant this petition and exercise its supervisory authority to correct departures from the usual course of judicial proceedings.

This district court granted a summary judgment to Defendants in this case when the record contained substantial factual issues. In doing so it applied as the standard whether the speech was "impertinent" and found that due process does not require notice in the school setting. Exhibits 2A and 2B. By its factual determination the court accredited the testimony of Defendants over that of the Plaintiff and independent witnesses in contravention of Rule 56 of the Federal Rules of Civil Procedure. By its legal conclusions, the court created new law contradictory to Supreme Court precedent. Ceoltex Corp. v. Catrett, 477 U.S. 317 (1986).

On appeal, despite a clear record, the appellate court majority emphasized the importance of local adjudication and faulted Plaintiff for not requesting a hearing. In reality the Defendants' affidavits before the court established that Defendants cancelled the hearing Plaintiff requested and refused to reschedule. The appellate court, like the district court, failed to address the contradictory affidavits in the record in its holding and refused to reconsider the issues when its glaring factual errors were noted. This approach which allows opinions to stand though based upon significant misstatements of fact undermines the integrity of judicial proceedings.

Additionally, the appellate court's opinion indicates that free speech rights for students depend upon the location of the school as if to suggest that rural Unicoi County students are entitled to less protection than urbanites in Washington, D.C.. Poling v. Murphy, No. 88-5538, at 11 (6th Cir. April 18, 1980). This localized approach complicates the work of federal courts and compromises the importance of federal constitutional freedoms.

CONCLUSION

It is unjust for federal courts to limit student's expression by oversimplifying this Court's opinion in Hazelwood as establishing a location test for student's First Amendment rights. It is equally

unjust for Dean Poling to be denied his day in court when material issues of fact were created by opposing affidavits filed in the federal court. And it is inexcusably unjust for that denial of Poling's day in court, and hence, his First Amendment freedoms, to be based upon a misapplication of this Court's rulings by both the district and appellate court and egregious, uncorrected factual inaccuracies reported and emphasized in the appellate opinion.

In light of the significance of the issues presented Petitioner urges this Court to grant this Petition for writ of certiorari and reverse the Sixth Circuit's holding.

Respectfully Submitted,

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APPENDIX

1. Poling v. Murphy, No. 88-5538 (6th Cir., April 18, 1989)

2A. Poling v. Murphy, Order, (E.D. Tenn., December 18, 1987)

2B. Poling v. Murphy, Order, (E.D. Tenn., March 22, 1988)

3. Poling v. Murphy, No. 88-5538, Order on Rehearing (June 28, 1989)

EXHIBIT 1

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 88-5538

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DEAN POLING,	)	
Plaintiff-Appellant,	)	ON APPEAL from the
	)	United States District
v.	)	Court for the Eastern
	)	District of Tennessee.
ELLIS MURPHY, et al.,	)	
Defendants-Appellees.	)	

Decided and Filed April 18, 1989

Before: ENGEL, Chief Judge, and MERRITT and NELSON, Circuit Judges.

NELSON, Circuit Judge, delivered the opinion of the court, in which ENGEL, Chief Judge, joined. MERRITT, Circuit Judge, (pp. 16-18) delivered a separate dissenting opinion.

DAVID A. NELSON, Circuit Judge. The main question presented in this appeal is whether the Federal Constitution gives a high school student license to make admittedly "discourteous" and "rude" remarks about his schoolmasters in the course of a speech delivered at a school-sponsored assembly. Until recent years, lawyers and educators alike might have found it puzzling that such a question should even be asked. Not today; the question is a serious one, under contemporary constitutional concepts, but on the factual record before us in this case, we think the answer is fairly obvious.

As the Supreme Court held last year in Hazelwood School District v. Kuhlmeier, 484 U.S. _____, 108 S.Ct. 562, 571, 98 L.Ed.2d 592, 606 (1988), "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." (Footnote omitted.) Civility is a legitimate pedagogical concern, in our view, and we shall affirm the summary judgment that the district court entered in favor of the defendants in this case.

I

Unicoi County High School, in Erwin, Tennessee, is a public high school with a total enrollment of about 875 students. Each spring the school conducts an election at which officers are chosen for the school's student council. Candidates for president of the council come from the school's junior class, and candidates for vice-president from the sophomore class.

In May of 1987 plaintiff Dean Poling, an honor student who was subsequently to become president of his senior class, was one of about a dozen juniors who had qualified as candidates for the Unicoi High student council presidency. It was customary for such candidates to give campaign speeches at a school assembly held shortly before the election. Except for pupils with excused absences, attendance at the assembly was mandatory for all members of the student body.

According to Mrs. Barbara Ollis, a guidance counselor who served as one of two faculty sponsors of the student council, it has long been the practice for faculty sponsors to review candidates' speeches in advance of delivery. About a week before the 1987 election campaign assembly, therefore, Mrs. Ollis met with the student candidates, including Dean Poling, and told them to submit drafts of their speeches to her for review. The deadline she set was Thursday, May 7, the day before the assembly. Mrs. Ollis emphasized to the candidates, according to her affidavit, "how important it was, especially for the President of the Student Council, to work in a cooperative way with the Administration in order that the Student Council could be effective in carrying out its function in bringing about changes which it thought would be appropriate."

As instructed, Dean Poling brought his proposed speech to Mrs. Ollis for review on Thursday afternoon, May 7. Mrs. Ollis read

the speech "very carefully," as she later attested, because it contained a "sick-baby joke" that initially struck her as being in dubious taste. The proposed speech read as follows:

> "Hi, I'm Dean Poling and I'm running for president of the Student Council.
>
> It's a common practice of politicians to cut down each other. Instead of doing this, I'm going to cut down you, the audience. Why am I going to do this? Because you idiots are too darn gullible. For example, what is black and blue and wrapped in plastic? A baby in a trash bag, of course.
>
> I just made you laugh at something incredibly sick. If I can do this to you, then the administration could probably take advantage of you also. For example, have you noticed that each year there are less and less assemblies? How many of you would like at least a chance at open campus? Would you like a better chance of having the prom in Johnson City? Is there something in this school you would like changed? The administration plays tricks with your mind and they hope you won't notice. Because of the administration's iron grip, our school has been kept behind other schools like Science Hill. If you want to break this grip, vote for me for president. I can try to bring back student rights that you have missed and maybe get things that you always wanted. All you have to do is vote for me, Dean Poling!
>
> Thanks."

Mrs. Ollis, a former teacher of English, made a grammatical correction in the text of the speech, changing "less and less assemblies" to "fewer and fewer assemblies." She also placed a mark beside the sentence that referred to "the administration's iron grip" and told Dean, as he later attested, "change this and your speech will be okay."

Change it he did. As delivered at the assembly on Friday, May 8, the speech had this peroration:

> "The administration plays trick with your mind and they hope you won't notice. For example, why does Mr. Davidson stutter while he is on the intercom? He doesn't have a speech impediment. If you want to break the iron grip of this school, vote for me for president. I can try to bring back student rights that you have missed and maybe get things that you have always wanted. All you have to do is vote for me, Dean Poling."

When Dean gave his revised speech, according to Mrs. Ollis, many of the students jumped up at the reference to Mr. Davidson (the assistance principal in charge of discipline at the school), clapped their hands, and yelled things like "way to go, Dean," and "we don't like him either."[1] The clapping, yelling, and so forth did not go "above or beyond that present for any of the candidates," according to several other affiants, and Mrs. Ollis may or may not have been guilty of exaggeration when she swore, as she did in her affidavit, that the Davidson remark "brought the house down." Be that as it may, the remark unquestionably brought down the ire of the school's principal, defendant Ellis Murphy. "I was quite upset," Mr. Murphy stated, adding that "I thought that the content of this speech was inappropriate, disruptive of school discipline, and in bad taste."

---

[1]In a motion to strike portions of the defendants' affidavits, plaintiff Poling contended that this and other passages in the affidavits constituted inadmissible hearsay. The contention has no merit, and the district court did not err in failing to grant their motion.

At the conclusion of the assembly, according to Dean Poling's affidavit,

> "Mr. Murphy told me that he did not like my speech and that it was in bad taste. I responded, 'I am sorry [you didn't like it] but it got me votes.' Mr. Murphy said it did not matter that it got me votes because it was in bad taste."

Mr. Murphy's affidavit says that Dean volunteered to apologize to Mr. Davidson. This proposal met with Murphy's enthusiastic approval, and the record contains no indication that Dean failed to make the promised apology to Mr. Davidson.

Later in the morning of the assembly, Mrs. Ollis tells us in her affidavit, two of the other student candidates came to her office at different times and complained that Dean Poling had gained an unfair advantage in the election by saying what he had said about Mr. Davidson. This opinion was also expressed by the incumbent student council president, a member of the senior class. Principal Murphy, the incumbent president, and both of the faculty sponsors participated in a mid-morning conference at which "[i]t was the consensus that Dean Poling should be declared ineligible to run. . . ." Superintendent of Schools Ron Wilcox subsequently concurred in the decision to declare Dean ineligible.

Dean and his father, Mr. Roy Poling, a minister and substitute teacher, met with Mrs. Ollis and Principal Murphy in the latter's office that Friday afternoon. The Polings were informed that Dean had been disqualified, and a lengthy discussion ensued. Principal Murphy, according to his affidavit, commented on Dean's alleged "disobedience of instructions, the disruptive effect he had had on the authority of the Administration, the insensitivity that he had shown by the derogatory remarks that he had made in public about Assistant Principal Davidson and the bad taste he had shown generally." Mr. Murphy also alluded to a vice-presidential campaign speech that Dean had made the year before, for which Dean was said to have been reprimanded because "it was given in black language (the type used by stand-up comics). . .that offended many people." (There were no black students at Unicoi, and it does not appear that Dean had consciously

intended to offend anyone in the earlier speech.)

With respect to the comment on Mr. Davidson and his "stutter," Dean's father himself expressed the view that "it was very discourteous." Mr. Poling explained, however, that Dean "was not attacking Mr. Davidson, but the administration." The administration, in the person of Principal Murphy, remained unmoved; the disqualification was not revoked, and the election went forward on Monday, May 11, with a reduced field of candidates.

To make the election more realistic, Mrs. Ollis had arranged to rent two voting machines from the Unicoi County Election Commission. Mrs. Ollis planned, at one point, to prepare new ballots omitting the names of Dean Poling and a student named Beth Edens, who had withdrawn as a candidate at the instance of her mother. Mrs. Ollis was told, however, that the use of new ballots would result in a doubling of the election commission's charges, so on the morning of the election commission's charges, so on the morning of the election she had the following announcement read over the school's public address system during the regular daily "announcement time:"

> "There are two students' names that remain on the ballot for their respective offices who are no longer candidates. These students are Beth Edens and Dean Poling. Therefore, any votes cast for Beth or Dean will not be counted."

Dean's father, who had acquiesced in the school's decision on Friday, was not at all pleased by this method of effectuating the disqualification of his son. At a tape-recorded meeting held on Tuesday, May 12, 1987, between the Polings and their lawyer and the school administrators, Mr. Poling complained that

> "I was told that [Dean's] name would not be on the ballot and he would not be allowed to run. Monday, his name was on the ballot. Monday, over the intercom in front of everyone, they were told that . . .it would do no good to vote for Dean or in words similar to that."

Mr. Poling took this an effort "to put Dean down, to humiliate him."

Notwithstanding his repeated concessions that what Dean had said about Mr. Davidson was "very discourteous" - or, as he said at another point, "very rude" - Mr. Poling concluded that "|t|here was someone out to get Dean." Dean had been told to change the speech in one particular, as Mr. Poling saw it; Dean had changed the speech in that particular, in Mr. Poling's view, and an administration that had "set out to crush Dean" then publicly humiliated him.

Mr. Poling warned the administrators that "there is a higher court than you four." Superintendent Wilcox agreed, and encouraged Mr. Poling to take the matter to the board of education if he was not happy with the decision:

> "|O|ur board meets Thursday night and I encourage you to come to our board of Education and I encourage you to ask them for a hearing and they will hear |it| and if we're wrong they'll overturn it."

Mr. Poling did not ask for a hearing before the board of education. Instead, a federal civil rights action was filed in Dean's name, by his parents as next friends, against the four school administrators and the board of education. The complaint alleged violation of Dean's rights under the First and Fourteenth Amendments of the United States Constitution, and it sought declaratory and injunctive relief and an award of damages in the amount of $300,000.

The defendants moved for summary judgment, supporting the motion with affidavits. The Polings filed opposing affidavits. The district court (Thomas J. Hull, J.) granted the motion for summary judgment and dismissed the action. A motion for reconsideration was overruled, and this appeal followed.

II

Did the school officials overreact in declaring Dean Poling ineligible for election? The district court recognized that possibility ("it may be that the school administration overreacted to the speech"), and for all we know there may in fact have been an overreaction. But a federal court is obviously not the ideal body to try to answer such a question.

The Unicoi County Board of Education, from which the Polings could have sought redress had they wished, presumably

were acquainted with at least some of the participants in this drama. We are not. We are not steeped in the culture of the place where the events occurred, moreover, and we have no firsthand knowledge of the atmosphere of the school or of the sense of propriety of those who work and study there. We are such outsiders, indeed, that we are at a loss even to understand the full significance of Dean Poling's reference to Mr. Davidson's "stutter." (The affidavit of Mrs. Ollis says, without contradiction, that Mr. Davidson does not stutter.) It is not improbable that the local board of education would have had, or could readily have acquired, a better sense of what actually was going on in the assembly than a remote federal court could reasonably aspire to.

Our impression, for whatever it may be worth, is that this is a tale without heroes and without villains - without a village Hampden, to borrow Mr. Justice Jackson's memorable phrase,[2] and without a village tyrant. Dean Poling appears to be an intelligent and imaginative young man, and probably no more anarchistic than many of his teachers at his age. Like most teenagers, Dean doubtless feels embarrassment very keenly - but he may not fully have appreciated that the assistant principals of this world are sentient beings also, some of whom may even be capable of experiencing embarrassment themselves. The transcript of the May 12 meeting between the Polings and the administrators - the only part of the record in which the players speak in their own voices, rather than in words written for them by their lawyers - suggests that the administrators of the Unicoi County High School are decent, well-meaning individuals who bore Dean Poling no ill will and who had no sinister plan to humiliate him before his peers. It may well be that a more relaxed or more self-assured administration would have let the incident pass without declaring Dean ineligible, and perhaps that is what this administration ought to have done; it is not for us to say. Such a question, we believe, represents a judgment call best left to the locally elected school board, not to a distant, life-tenured judiciary. Cf. Bethel School District No. 403 v. Fraser, 478 U.S. 675, 683 (1986)("The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board.")

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[2]West Virginia State Board of Education v. Barnette, 319 U.S. 624, 638 (1943). Cf. Rex v. Hampden (1637) 3 Howell's State Trials 825.

It is true, to be sure, that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," and "[s]chool officials do not possess absolute authority over their students." Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 506 and 511 (1969). It also remains true, however, that the Federal Constitution does not compel "teachers, parents, and elected school officials to surrender control of the American public school system to public school students." Fraser, 478 U.S. at 686, quoting Tinker, 393 U.S. at 526 (Black, J., dissenting). (Cf. Hazelwood School District v. Kuhlmeier, 484 U.S. ___, 108 S.Ct. 562, 570 n. 4, 98 L.Ed.2d 592, 605 n.4, where Justice Black's observation was also thought relevant.) Limitations on speech that would be unconstitutional outside the schoolhouse are not necessarily unconstitutional within it.

The Supreme Court has drawn a distinction between "personal expression that happens to occur on school premises" and expressive activities that are "sponsored" by the school and "may fairly be characterized as part of the school curriculum..." Hazelwood, 108 S.Ct. at 569-570, 98 L.Ed.2d at 605. Speech sponsored by the school is subject to "greater control" by school authorities than speech not so sponsored, because educators have a legitimate interest in assuring that participants in the sponsored activity "learn whatever lessons the activity is designed to teach. . . ." Id. As long as the actions of the educators are "reasonably related to legitimate pedagogical concerns," therefore, the Hazelwood Court held, as we have seen, that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities. . . ." Id., 108 S.Ct. at 571, 98 L.Ed.2d at 606.

Applying these concepts to the case at hand, there can be no doubt that the election and election assembly were "school-sponsored" activities within the meaning of Hazelwood. (Plaintiff Poling's reply brief suggests that "by definition" student government is incapable of the sort of pedagogical purpose that merits school sponsorship; we find this suggestion unintelligible.) School officials scheduled the assembly to be held during school hours and on school property. They made attendance compulsory for everyone. They determined the eligibility of prospective speakers. They rented the voting machines. And they vetted the speeches in advance, correcting inappropriate grammar and attempting to weed out or temper inappro

priate content. There is no genuine issue as to any material fact regarding school sponsorship. The only real question, under Hazelwood, is whether the actions of the school officials were reasonably related to "legitimate pedagogical concerns" - and the existence or nonexistence of such a relationship, we take it, is a question of law.

The universe of legitimate pedagogical concerns is by no means confined to the academic; as the Supreme Court put it in Fraser, "schools must teach by example the shared values of a civilized social order." 478 U.S. at 683. Sometimes, of course, these "shared values" come in conflict with one another; independence of thought and frankness of expression occupy a high place on our scale of values, or ought to, but so too do discipline, courtesy, and respect for authority. Judgments on how best to balance such values may well vary from school to school. Television has not yet so thoroughly homogenized us that conduct deemed unexceptionable in New York City, for example, will necessarily be considered acceptable in rural Tennessee.

Local school officials, better attuned than we to the concerns of the parents/taxpayers who employ them, must obviously be accorded wide latitude in choosing which pedagogical values to emphasize, and in choosing the means through which those values are to be promoted. We may disagree with the choices, but unless they are beyond the constitutional pale we have no warrant to interfere with them. Local control over the public school, after all, is one of this nation's most deeply rooted and cherished traditions. See Milliken v. Bradley, 418 U.S. 717, 741-42 (1974).

To the administrators of the Unicoi County High School, Dean Poling's seemingly gratuitous comment on Assistant Principal Davidson was in "bad taste." Whether it strikes us so is immaterial; "de gustibus," as the ancient wisdom has it, "non disputandum est." It was not irrational, to say the least, for the school authorities to take offense at a remark that was calculated to get Dean votes at the expense of the assistant principal's dignity.

The art of stating one's view without indulging in personalities and without unnecessarily hurting the feelings of others surely has a legitimate place in any high school curriculum, and we are not prepared to say that the lesson Unicoi High tried to teach Dean Poling and his captive audience was illegitimate. Neither can we say that the method by which the school sought to drive the lesson home was so extreme as to violate the Constitution. See Schwartz v. Schuker,

298 F.Supp. 238 (E.D.N.Y. 1969)(ban on distribution of underground school newspaper within school grounds upheld, where newspaper referred to principal as "King Louis" and "a big liar" with "racist views and attitudes"); Bystrom v. Fridley High School, 686 F.Supp. 1387 (D.Minn. 1987), aff'd, 855 F.2d 855 (8th Cir. 1988)(suspension of students who distributed newspaper referring to vandalism at home of high school teacher as "pretty damn funny" did not violate First Amendment rights).

Our conclusion is consistent with the recent decision in Crosby v. Holsinger, 852 F.2d 801 (4th Cir. 1988). In that case a high school principal acted to censor displays of a school symbol, "Johnny Reb," because of complaints from black students and parents that they found the symbol offensive. A directed verdict for the principal in a suit alleging that he had violated the First Amendment was affirmed, the court of appeals noting that because "[a] school mascot or symbol bears the stamp of approval of the school itself," it was sufficient that the principal's decision to eliminate the symbol was "based on legitimate concerns." Id. at 802. If it was legitimate for the school officials in Holsinger to restrict student expression because it insulted a segment of the student body, it was legitimate for the school officials here to restrict speech considered insulting to the officials themselves.

It is important to bear in mind, we think, that the school officials made no attempt to compel Dean Poling to say anything he did not want to say. In the great compulsory flag salute case, West Virginia State Board of Education v. Barnette, supra, 319 U.S. 624, the Supreme Court was "dealing with a compulsion of students to declare a belief." Id. at 631. The state in that case affirmatively "require[d] the individual to communicate by word and sign of his acceptance of the political ideas [the flag]. . .bespeaks." Id. at 633. The compulsory flag salute and pledge of allegiance "require[d] affirmation of a belief and an attitude of mind," and it seemed to Mr. Justice Jackson in Barnette, as it seems to us here, that "involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence." Id. at 633. A student must not be compelled to affirm a belief in the flag against his will, as Barnette held, but it does not follow that a student must therefore be permitted to insult his teachers against their will.

It is also important to bear in mind, again, that Dean Poling's speech - unlike the symbolic acts of John and Mary Beth Tinker in wearing black armbands to school, see Tinker, supra, 393 U.S.

503 (1969) - was speech sponsored by the school and disseminated under its auspices. "A school must be able to set high standards for the student speech that is disseminated under its auspices," Hazelwood, supra, 98 L.Ed.2d at 605-06 (emphasis supplied), and the Supreme Court has made it quite clear that the First Amendment standard for determining when non-sponsored student speech may be punished is a standard that need not be applied where sponsored student speech (a student newspaper, e.g., or a student council election campaign) is concerned. Id. at 606. "Instead," the Supreme Court said in Hazelwood, "we hold that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." Id. If words have meaning, that is the First Amendment test which we are required to apply to Dean Poling's campaign speech.

III

Dean Poling's disqualification did not, as we see it, violate his due process rights under the Fourteenth Amendment. The Due Process Clause says that "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, section 1. We do not believe that Dean has shown any deprivation of "life" or "liberty" or "property" within the meaning of this clause.

This court has heretofore held that "[t]he privilege of participating in interscholastic athletics. . .[is] outside the protection of due process." Hamilton v. Tennessee Secondary School Athletic Association, 522 F.2d 681, 682 (6th Cir. 1976). The privilege of participating in a student council election seems no different.

We are told on appeal that it has been customary to grant a $100 college scholarship to the Unicoi High student council president. If we are entitled to make use of this information, we think it changes nothing. Dean Poling had no guarantee that he would have been elected president if not disqualified, and no guarantee that he would have received the scholarship. He had, at best, "a mere expectation rather than a constitutionally protected claim of entitlement." Walsh v. Louisiana High School Athletic Association, 616 F.2d 152, 159 (5th Cir. 1980), cert. denied, 449 U.S. 1124 (1981).

We see nothing improper, moreover, in the process

through which Dean's disqualification was effected. Dean was put on notice before he gave his speech that it was considered important for the president of the student council "to work in a cooperative way with the Administration." He was specifically told that his proposed reference to "the administration's iron grip" would have to be changed. Dean was far too intelligent, as the district court recognized, to suppose that a reference to "the iron grip of this school" would be made more palatable to the administration by the introduction of a discourteous reference to the assistant principal and his "stutter."

The district court found that "it could not have been a surprise to [Dean] Poling that he received some discipline." There was no showing to the contrary. Dean obviously elected to gamble on the forbearance of the administration, hoping to win additional votes from his peers, and he simply lost his gamble. Politics is the art of the possible, it has been said, and Dean knows now that one misjudges the possible at his peril. The price Dean paid in learning this valuable lesson does not seem excessive, particularly in light of the fact that he went on to win election to the presidency of the senior class.

It is true that the administration had decided to disqualify Dean for the student council presidency before he was accorded a hearing, but Dean and his father were promptly given a two-hour audience with the principal and Mrs. Ollis on Friday afternoon, three days before the election. At least two further sessions were conducted within a day or two after the election. There is no reason to doubt that the board of education would have entertained an appeal from the administration's decision had the Polings requested one, as Superintendent Wilcox encouraged them to do. Surely the Due Process Clause would have required nothing more than this even if a deprivation of some constitutionally protected liberty or property interest had been established.

The judgment of the district court is AFFIRMED.

MERRITT, Circuit Judge, dissenting. The Court has applied the wrong First Amendment test to this student's political speech and has therefore reached the wrong result.

The applicable First Amendment cases hold that when a high school student engages in political or "pure speech" in a school forum the student is protected by the First Amendment under a test substantially similar to that for adults. In the compulsory flag salute

case, Justice Jackson, speaking for the Court, said:

> The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures - Boards of Education not excepted. . . . That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.

West Virginia State Bd. of Education v. Barnette, 319 U.S. 624, 637 (1943).

In the black arm band protest case, Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969), the Court said that in political speech cases students

> may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.

Id. at 511 (emphasis added). Neither Barnette nor Tinker has been overruled. They continue to teach that the First Amendment protects the political speech of public-school students.

After the passage just quoted, Tinker goes on to state the "constitutionally valid reasons" for regulating student speech. The protected category of political speech does not include

> conduct by the student, in class or out of it, which for any reason - whether it stems from time, place, or type of behavior - materially disrupts classwork or involves substantial disorder or invasion of the rights of others. . . .

Id. at 513. In the student political speech cases, the Supreme Court makes clear that the question is not one of "civility," "rudeness" or "bad taste" as my brothers seem to think. The question is one of "disruption" and "substantial disorder."

Recent cases permitting schools to regulate speech of secondary school students have explicitly declined to overrule Barnette and Tinker. In Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675 (1986), the Supreme Court specifically noted that the regulation of sexually explicit and salacious student speech was "unrelated to any political viewpoint" and, thus, did not implicate the rule announced in Tinker. Bethel School Dist., 478 U.S. at 685. And in Hazelwood School Dist. v. Kuhlmeier, 108 S. Ct. 562 (1988), the Supreme Court held that the rule of Tinker need not apply where a school wishes to "refuse to lend its name and resources to the dissemination of student expression." Hazelwood, 108 S. Ct. at 570. The sort of "legitimate pedagogical concern" that warranted the regulation of student speech in Hazelwood was a school's decision not to permit a student paper to invade the right of privacy of an unwed, pregnant student.

By ignoring the co-existence in our law of Barnette and Tinker on the one hand, and Bethel and Hazelwood on the other, the majority virtually erases the rule of the earlier cases. Political speech of students that does not threaten to foment "substantial disorder," "disruption" or "invasion of privacy" is still protected under the First Amendment. Because the majority has used the wrong standard, it has reached the wrong result. There is no evidence in this case of "substantial disorder," "disruption" or "invasion of privacy."

Dean Poling's speech to 800 students at the high school assembly was "political speech," pure and simple. It was not a vulgar speech like the one found unprotected in Bethel or a gross invasion of the right of privacy of any unwed, pregnant student as in Hazelwood. Poling was running for president of the student body of his school. He made a tough populist speech, short but not sweet. His main point was this:

> If you want to break the iron grip of this school, vote for me for President. I can try to bring back student rights that you have missed and maybe get things that you have always wanted. All you have to do is vote for me, Dean Poling.

His fellow students from the hills and hollows of rural upper East Tennessee stood and cheered, but they were not disruptive. Although critical of the administration and of one particular teacher, the speech cannot be classified as one which "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." Tinker, 393 U.S. at 513. If the school administration can silence a student criticizing it for being narrow minded and authoritarian, how can students engage in political dialogue with their educators about their education?

For the foregoing reasons, I respectfully dissent.

EXHIBIT 2A

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE NORTHEASTERN DIVISION

FILED DEC. 18, 1987

DEAN POLING	)	
	)	
v.	)	NO. CIV-2-87-229
	)	
ELLIS MURPHY, ET AL.	)	

ORDER

The plaintiff in this case is a high-school student who alleges that the defendants violated his first and fourteenth amendment rights by declaring him ineligible to run for the office of president of the student council as a result of the content of his election speech. This matter is before the Court on the defendant's motion for summary judgment.

The defendants claim that they were well within their rights and did not violate the plaintiff's civil rights. According to the defendants, plaintiff's statements such as "... the administration plays tricks with your mind and they hope you won't notice. For example, why does Mr. Davidson stutter while he is on the intercom? He doesn't have a speech impediment. If you want to break the iron grip of this school, vote for me for president ..." were disruptive to the student body and made after a teacher said that they must be deleted. The plaintiff, however, claims that he made all changes he was asked to make and that he was not warned to refrain from making the statements at issue. Since a material fact exists as to whether his due process rights were violated because he had no way of knowing that the delivery of the speech at issue would subject him to disciplinary sanctions, summary

judgment on this issue is inappropriate at this time.

The defendants further claim that this case is moot. They say that because of errors committed in tabulating votes, a new election was held in which the plaintiff was eligible to run. The plaintiff says that this case is not moot because although a new election was held, graduating seniors had left the school and were no longer eligible to vote and that therefore, he did not have the same opportunity to be elected as he had during the first election. Furthermore, he says that the new election did nothing to moot his claim for damages concerning the stigma and humiliation he suffered because of the alleged public ridicule. Accordingly, since the later election did not resolve the matters in dispute, this case is not moot. See Powell v. McCormack, 395 U.S. 486 (1969).

Defendants further contend that plaintiff's claim that his first amendment rights were violated should be dismissed under the authority of Bethel School District No. 403 v. Fraser, 478 U.S. _____, 92 L.Ed 549 (1986). In Bethel, a high school student gave a speech before a student assembly using sexual metaphors, and he was disciplined by school authorities. The Supreme Court recognized that schools have a duty to educate youth for citizenship and teach them socially appropriate behavior. Therefore, the Court ruled that school authorities were well within their rights to discipline the student, and that his rights under the first amendment were not violated.

The plaintiff contends that the Bethel decision is not dispositive of this case because the student in Bethel was using sexual metaphors, whereas he was not. Nevertheless, the Supreme Court recognized in Bethel that even in our nation's legislative halls, there are rules prohibiting the use of offensive expressions, noting that the House of Representatives prohibits the use of "impertinent" speech and that a Senator may be called to order for imputing improper motives to another Senator. The Supreme Court then ridiculed the idea that what is proscribed in the halls of Congress could be beyond the reach of school regulation. Id. 92 L.Ed.2d at 558. Clearly, in this case the plaintiff's speech was impertinent and he certainly imputed improper motives to the school administrators when he said that they "played tricks" with student's minds and when he implied that Mr. Davidson, a school administrator, intentionally stuttered for improper reasons. Accordingly, the plaintiff's speech was within the realm of the administration's right to regulate such speech at school assemblies, and this

case is not of the same nature as cases like Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969), which recognize that students have a right to engage in passive conduct such as wearing a black armband for political reasons.

Accordingly, for the reasons stated above, the defendants' motion to dismiss plaintiff's first amendment claim is hereby GRANTED, and it is so ORDERED; however, he will be allowed to proceed with his due process claim.

ENTER:

THOMAS G. HULL
UNITED STATES DISTRICT JUDGE

EXHIBIT 2B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE NORTHEASTERN DIVISION

FILED MARCH 22, 1989

DEAN POLING	)	
	)	
v.	)	NO. CIV-2-87-229
	)	
ELLIS MURPHY, ET AL.	)	

ORDER

This is a civil rights action in which high-school student Dean Poling claims that the defendant Unicoi County High School administrators, faculty, etc., violated his First and Fourteenth Amendment rights by declaring him ineligible to run for the office of president of the student council as a result of the content of his election speech. In an Order of December 18, 1987, this Court granted the defendants summary judgment on the First Amendment issue on the basis of Bethel School District No. 403 v. Fraser, 478 U.S. _____, 106 S.Ct. 3159 (1986), but declined to grant them a judgment on the due process claim. The defendants have moved to reconsider the due process issue. (Doc. 19).

In support of their motion, the defendants address the Court's expressed concern that plaintiff Poling had no way of knowing that delivering the speech at issue would subject him to disciplinary sanctions. A careful examination of the first and second drafts of the speech make it clear to the Court that Mr. Poling's second speech, not submitted for prior faculty review, contained new and controversial language which Mr. Poling probably knew perfectly well would alarm the administration. And, while it may be that the school administration

overreacted to the speech, particularly the part that referred to one of these administrators by name, it could not have been a surprise to Mr. Poling that he received some discipline. In addition, while the several hearings were clearly post-deprivation, or after the announcement of the disqualification, the Fourteenth Amendment to the Constitution does not mandate pre-disciplinary hearings in school situations. The Court finds that Mr. Poling received all the process to which he was due.

Accordingly, the defendants' motion for summary judgment on the remaining issue of due process is also GRANTED and this action is DISMISSED.

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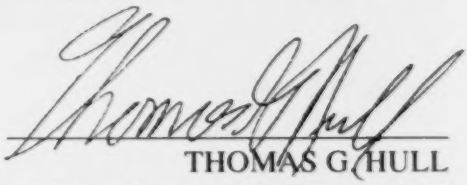


THOMAS G. HULL
UNITED STATES DISTRICT JUDGE

EXHIBIT 3

NO. 88-5538

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED JUNE 28, 1989

LEONARD GREEN, Clerk

DEAN POLING, for himself and all others similarly situated as students of Unicoi Co. High School

Plaintiff - Appellant

ROY POLING; EMMA POLING

Plaintiffs

v.

ORDER

ELLIS MURPHY, Principal-Unicoi Co. High School; BARBARA OLLIS, Guidance Counselor; ALTA EDWARDS, History Teacher; RONALD WILCOX, Superintendent of Schools; UNICOI COUNTY BOARD OF EDUCATION; KENNETH LEWIS, Chairman; DORRIS HENSELEY; GARLAND EVELY; GLENN HOWARD; PAUL MONK; CAROLYN SEELEY and W.A. WILSON, Members, Unicoi Co. Board of Education

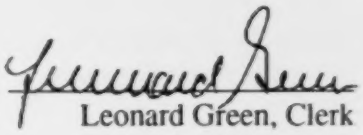
Defendants - Appellees

BEFORE: ENGEL, Chief Judge, MERRITT and NELSON, Circuit Judges.

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT



Leonard Green, Clerk

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Petition for Writ of Certiorari was mailed, first-class postage prepaid, to Mr. N. R. Coleman, Jr., Attorney at Law, Post Office Box 1060, Greeneville, Tennessee, 37744, on this 25 day of October, 1989.

prenotary filed 9-26-

Penny J. White

PENNY J. WHITE

No. 89-678

Supreme Court, U.S.
FILED
NOV 21 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1989

DEAN POLING,
Petitioner,

vs.

ELLIS MURPHY, BARBARA OLLIS, ALTA EDWARDS, RONALD WILCOX, UNICOI COUNTY BOARD OF EDUCATION, KENNETH LEWIS, DORIS HENSLEY, GARLAND EVELY, GLENN HOWARD, PAUL MONK, CAROLYN SEELEY & W.A. WILSON,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

The respondents submit that an accurate statement of the question presented for review is: Whether a high school student's campaign speech given as part of a school-sponsored activity that is facially disrespectful to the school administration's authority is protected by the First Amendment to the United States Constitution?

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No. 89-678

IN THE

Supreme Court of the United States

October Term, 1989

DEAN POLING,
Petitioner,

vs.

ELLIS MURPHY, BARBARA OLLIS, ALTA EDWARDS, RONALD WILCOX, UNICOI COUNTY BOARD OF EDUCATION, KENNETH LEWIS, DORIS HENSLEY, GARLAND EVELY, GLENN HOWARD, PAUL MONK, CAROLYN SEELEY & W.A. WILSON,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The respondents assert that the petitioner's "statement of the case" omits information which causes it to be incomplete and therefore misleading in the following respects:

Dean Poling asserts that he was reprimanded by Principal Murphy and not given an opportunity to respond to the reprimand. The petitioner omits that he did respond by stating: "I am sorry [you didn't like it] but it got me votes." Also, Dean Poling offered to apologize to Assistant Principal Davidson.

Dean Poling asserts that he and his father met with the advisor, principal and superintendent after the decision had been made to remove him from the race, that they encouraged the Polings to seek review by the local school board and that upon advice of counsel, the superintendent cancelled the hearing and declined to reschedule it. The petitioner omits that in this initial meeting, Mr. Poling told his son that he had done wrong, that Dean Poling was reminded that he had been reprimanded the year before for giving a racially derogatory speech, that school officials met with or called Mr. Poling on six other occasions, and that Mr. Poling attended a school board meeting at which he failed to exercise his opportunity to speak—all of which occurred before counsel for the Board advised the superintendent to decline to give the Polings an opportunity for further hearing.

The petitioner asserts that the district court failed to act on his motion to strike inadmissible portions of affidavits, that the district court granted summary judgment and then denied the motion to strike because it was moot. The petitioner omits that the district court held that the motion to strike was moot because the portions of the affidavits at issue were not relied upon in the court's ruling.

The petitioner asserts that the district court granted the respondent's motion to reconsider despite no new information being submitted to the court. The petitioner

omits that the court initially denied respondent's motion for summary judgment on the issue of due process because of the petitioner's representation that the draft of the speech had been reviewed by the advisor, that Dean Poling had been instructed to make certain changes, that he had made those changes and therefore, he could not have known that he would be punished for his conduct. Petitioner omits that the respondents apprised the court in their motion to reconsider that Dean Poling also added the offensive language concerning Assistant Principal Davidson to the revised speech, that no school official reviewed the revised speech and that Dean Poling could reasonably have known that he would be punished for his impertinent remark.

The petitioner asserts that the Sixth Circuit never addressed the material factual issues presented by the opposing affidavits. The petitioner omits that the Sixth Circuit stated at footnote 1: "In a motion to strike portions of the defendants' affidavits, plaintiff Poling contended that this and other passages in the affidavits constituted inadmissible hearsay. The contention has no merit, and the district court did not err in failing to grant the motion." *Poling v. Murphy*, No. 88-5538, at 4 (6th Cir. April 18, 1989) (17a).[1]

The petitioner asserts that the Sixth Circuit focused on its mistaken impression that the proper recourse of the petitioner would be to seek redress from the local board of education, instead of the district court. The petitioner omits that the court held that Dean Poling had not shown he was entitled to due process under the Fourteenth Amendment.

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[1] The reference(s) to a page followed by an "a" is to the Appendix in the petition for certiorari.

ARGUMENT

I. THIS PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE SIXTH CIRCUIT COURT OF APPEALS PROPERLY APPLIED SUPREME COURT PRECEDENT.

Introduction

The question presented for review is whether the law of *Tinker, infra,* or *Hazelwood, infra,* applies to the facts of this case.

Tinker Facts

Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969) involved students who protested the Vietnam War by wearing black armbands to school, despite the fact that school authorities had passed a policy forbidding the wearing of armbands on campus. *Id.* at 504. The Court found that "the wearing of an armband for the purpose of expressing certain views is the type of symbolic act that is within the Free Speech Clause of the First Amendment." *Id.* at 505.

However, the Court also found that: "[this] Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." [Citations omitted] *Id.* at 507.

These findings pose a dilemma in determining the First Amendment rights of a student versus the right to control conduct in our schools. *Id.* at 507. This Court held that to constitutionally prescribe the expression by a student that the school must be able to show "that the students' activities would materially and substantially disrupt the work and discipline of the school." *Id.* at 513.

The school officials in *Tinker* had never alleged that the wearing of armbands caused a disruption, there was no proof it caused a disruption and the school officials did not purport to prohibit the wearing of other political symbols—such as political buttons or even the Iron Cross, traditionally a symbol of Nazism. *Id.* at 510. Therefore, the Court held that under these circumstances, our Constitution does not permit the school to prohibit the student's expression. *Id.* at 514.

Hazelwood Facts

Hazelwood School District, et al v. Kuhlmeier, et al, 484 U.S. _____, 98 L. Ed. 2d 592 (1988), involved censorship of articles written by students in the school newspaper, Spectrum. Spectrum was written and edited by the Journalism II class at Hazelwood East. The board of education allotted funds for the printing of Spectrum. The teacher who taught the course resigned on April 29 and the final edition for the school year was scheduled to be published on May 13. Another teacher was named advisor to the school paper for the remaining weeks of the term. On May 10, the teacher delivered proofs of the May 13 edition to the principal who objected to two articles—one on student pregnancy and the other on the impact of divorce of students at school. *Id.* at 600.

The principal objected to the pregnancy article because, although the girl's names had been changed, he thought the girls would still be identifiable and that the references to sexual activity and birth control were inappropriate for some of the younger students. With respect to the article on the impact of divorce, the principal thought that the parents should be given an opportunity to respond or consent to the publication. *Id.* at 601.

The Court found that the principal reasonably believed that either the pages on which these articles were printed had to be deleted or that the newspaper would not be published at all. The Court held that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns. *Id.* at 608.

Which Standard Applies

This Court in *Hazelwood* acknowledged that:

> [T]he question whether the First Amendment requires a school to tolerate particular student speech—the question that we addressed in *Tinker*—is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. The former question addresses educators' ability to silence a student's personal expression that happens to occur on the school premises. The latter question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents and members of the public might reasonably perceive to bear the imprimatur of the school. These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.
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> *Id.* at 605.

Did Dean's speech "happen to occur on the school premises" or was it part of "a school-sponsored activity?"

Dean Poling was running for president of the student council. Each of the students was required to obtain a requisite number of signatures on a petition before becoming candidates, they were instructed on the availability of certain portions of the school for campaign posters, they were admonished to respect the campaign posters of the others, and they were required to give a campaign speech during a school assembly. Attendance by all students was mandatory. A guidance counselor, Barbara Ollis, assisted the candidates in the preparation of their speeches. She reviewed the speeches with each student, individually, and in the case of Dean Poling, instructed him to make certain changes. Ballots were printed and voting booths were rented. Students were taken out of English class to go to the polls.

The petitioner asserts that the Sixth Circuit opinion stretches the school-sponsored concept to the point that "every on-campus statement made during school hours or at school function is 'school sponsored' " and therefore the effect of the opinion is "students shed their First Amendment rights at the schoolhouse gates". This is nonsensical.

Even the dissenting opinion in *Hazelwood,* acknowledges that a campaign speech is a school-sponsored activity:

> As the second paragraph of *Fraser* evinces, if ever a forum for student expression was 'school-sponsored', Fraser's was:
>
> 'Fraser . . . delivered a speech nominating a fellow student for student elective office. Approximately 600 high school students . . . attended the assembly.

> Students were required to attend the assembly or to report to study hall. The assembly was part of a *school-sponsored* educational program in self-government.'
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> *Hazelwood* at 612 (Quoting *Fraser,* 478 U.S. at _____, 92 L. Ed. 2d 549, 106 S. Ct. 3159.)

There has been no misapplication of Supreme Court precedent. *Tinker* and *Hazelwood* present two separate questions and the facts of *Poling* are entirely consistent with *Hazelwood.* The students' free speech rights enunciated in *Tinker,* have not been shed at the courthouse door. *Tinker* does not apply.

II. THIS COURT SHOULD DENY THE PETITION BECAUSE THERE HAS BEEN NO DEPARTURE FROM THE USUAL COURSE OF JUDICIAL PROCEEDINGS.

Dean Poling asserts that the district court granted summary judgment when the record contained substantial factual issues and that in doing so, the court applied a standard of whether or not the speech was "impertinent." The district court and the Sixth Circuit, both found that there were no disputes with respect to material facts. In addition, the standard applied by the district court was the standard applied in *Bethel.* The district court distinguished *Tinker* from *Bethel* and the case *sub judice.* With respect to *Hazelwood,* it had not been published at the time the court granted the respondents' motion for summary judgment.

Dean Poling also attacks the district court and the Sixth Circuit on the issue of due process because the district court held that due process does not require notice in a school setting; and because the Sixth Circuit faulted Poling for not requesting a hearing.

The Sixth Circuit held:

> We do not believe that Dean has shown any deprivation of 'life' or 'liberty' or 'property' within the meaning of this clause.
>
> This Court has heretofore held that '[t]he privilege of participating in interscholastic athletics . . . [is] outside the protection of due process.' *Hamilton v. Tennessee Secondary School Athletic Association,* 552 Fed. 2d 681, 682 (6th Cir. 1976). The privilege of participating in a student council election seems no different.
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> *Poling v. Murphy,* No. 88-5538, at 14 (6th Cir. April 18, 1989) (25a).

Therefore, the Sixth Circuit held that Poling failed to establish entitlement to due process. The Court did state in *dictum* that it felt sure that based upon listening to the tape recordings of meetings between school officials and the *Polings*, that the board of education would have granted the Polings a hearing, if one had been requested. It is also true that counsel for the petitioner did request a hearing and that that request was denied. However, counsel for the petitioner omits in her argument that Dean Poling's father, Roy Poling, did attend a school board meeting, but that he failed to speak at the meetings—though there was ample opportunity.

The following is a brief summary of the hearings that Dean Poling and/or his father, Roy Poling, had with school officials concerning Dean's speech:

1. Immediately after the speech was delivered, Dean Poling, Ellis Murphy, Mr. Clark and Ms. Ollis discussed the contents of Dean's speech and the principal informed him that the speech was objectionable.

2. At 1:30 p.m. on the same day, the following individuals met for two hours: Principal Murphy, Ms. Ollis, Roy Poling and Dean Poling.

3. On Monday, May 11, 1987, at 4:00 p.m., Superintendent Wilcox, Roy Poling, Dean Poling and others attended a meeting of the Unicoi County Election Commission. Dean Poling was the topic of the meeting.

4. After the Election Commission meeting, Superintendent Wilcox and Mr. Poling discussed the matter further in the Superintendent's office.

5. On Tuesday, May 12, 1987, Superintendent Wilcox met with Mr. and Mrs. Poling, Dean, Attorney Ron Stromburg, Ms. Ollis, Principal Murphy and Superintendent Wilcox.

6. Roy Poling was invited to attend the school board meeting scheduled for May 14, 1987. The time of the meeting was changed from 6:00 p.m. to 5:00 p.m. and Superintendent Wilcox called Mr. Poling personally to inform him of the change. Mr. Poling appeared at the meeting, but did not speak.

7. The next Sunday, Superintendent Wilcox called Roy Poling to set up another meeting, and Mr. Poling was evasive. No further meetings were held.

8. Counsel Penny White was employed by the Polings and demanded a hearing before the School Board and upon the advice of counsel, this demand was denied.

CONCLUSION

As admitted by even the dissent in *Hazelwood*, a student's campaign speech is part of a school-sponsored activity. This Court has set forth the standard to be followed in cases such as this and the Sixth Circuit has applied that standard. The petitioner complains that there are disputed material facts making this case improper for summary judgment, and yet the petitioner fails to set forth any disputed fact which could be deemed material with respect to the application of the facts of this case to the law as set forth in *Hazelwood*.

For these reasons, the respondents respectfully submit that the petition for certiorari should be denied.

Respectfully submitted,

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